1966

Alice Mae Buck v. Edwin Holt Buck : Defendant-Respondent and Cross-Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

ALICE MAE BUCK,
Plaintiff-Appellant,

vs.

EDWIN HOLT BUCK,
Defendant-Respondent and Cross-Appellant.

Case No. 10595

DEFENDANT-RESPONDENT AND CROSS-APPELLANT'S BRIEF

Appeal from Judgment of the Third District Court for Salt Lake County Honorable Merrill C. Faux, District Judge

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PRINTED BY SALT LAKE TIMES

TABLE OF CONTENTS

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NATURE OF THE CASE

This is an action for an annulment and to determine what the parties contributed to the acquisition of the estate and to determine an equitable distribution of the accumulated property.

DISPOSITION MADE OF THE CASE IN THE LOWER COURT

This case was tried before the Honorable Merrill C. Faux, District Judge, sitting without a jury. At the opening of the trial, the court granted the annulment based upon the decree theretofore rendered by the Honorable Stewart M. Hanson, District Judge, and upon the stipulation of plaintiff and defendant. The court then proceeded to hear four days of testimony and two concluding arguments, together with two subsequent arguments, on the law and the evidence, held on the 28th day of October, 1965 (at the instance of the court), and again on the 21st day of December, 1965 (upon the motion of plaintiff). The court then granted plaintiff the sum of $31,957.43, less the sum of $7,214.00, received by plaintiff from defendant in the year prior to judgment, viz. the sum of $24,742.73, together with interest at 6% from the 16th day of October, 1964, to November 29, 1965. The court determined that said sum was an equitable distribution of the property acquired through the joint efforts of the plaintiff and defendant during their cohabitation. Plaintiff appealed from the decision and defendant cross-appeals.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent and Cross-Appellant seeks a reduction in the amount awarded to plaintiff-appel-

lant from the sum of $31,957.43 to not more than the sum of $10,203.04 without interest.

STATEMENT OF FACTS

In the early part of October, 1964, plaintiff left defendant and the home where the parties had been living for years and thereafter sued defendant for divorce (Tr. 317). Defendant answered and then moved to dismiss plaintiff's complaint on the ground that no marriage existed. The motion was granted (Tr. 1 and 2), and a decree of annulment was entered, and the matter came on to be heard on the 7th day of October, 1965. The only questions remaining to be determined were: 1) the amount contributed to the acquisition of the property by each of the parties, and 2) an equitable distribution of the property acquired during the cohabitation.

Plaintiff and defendant cohabited as man and wife from the 17th day of March, 1945, to on or about the 18th day of October, 1964, when plaintiff absented herself from the residence where the parties had been living and did not return (Tr. 317).

Plaintiff was a divorcee with two children at the time she purportedly married Mr. Buck and knew, at the time of the purported marriage, that his divorce was not final (Tr. 392).

Approximately one year after the purported marriage, in the spring of 1946, plaintiff and defendant

moved to Salt Lake City, Utah, where Mr. Buck purchased a beer tavern (Tr. 302-303). Shortly thereafter a lot was purchased, then a residence, shares of stock, a duplex and then the real property on which the tavern is located (Tr. 302-304). The acquisition cost of all of this property was $108,200.88 (Tr. 307). Defendant invested his inherited capital, together with its increment, in the property. (Tr. 210, 215, 292-299).

Defendant managed and controlled all property and investments (Tr. 25, 305, 306, 405, 408, 323, 319), and plaintiff, in addition to keeping house for herself and defendant, worked on some occasions at the tavern (Tr. 118). Defendant cared for one of the children of plaintiff at his home for a time (Tr. 175, 197), and provided employment for the husband (Ted Thorstead) of the other child of plaintiff (Tr. 314, 157).

Throughout the period of cohabitation, defendant provided plaintiff with a comfortable living above the average (Tr. 118, 174-175, 337-338, 340-341). The parties were able to and did live well above the average.

Defendant-respondent and cross-appellant disagrees with the statement of facts of plaintiff-appellant where it is said, "they purchased a tavern" (Tr. 301-303); where it is stated that only the first small amounts of stock purchased came from assets the defendant had at the time of the marriage and that thereafter money for the stocks came from joint earnings (Tr. 210); that "there was some small income received from the California property" (Tr. 295-296, Ex. 15-D), the im-

plication that the business was built by both of them, and the implication that defendant depleted the estate by his drinking, gambling and ownership of Cadillacs —it is believed that the many parts of the evidence referred to in the argument, *infra,* will prohibit any credence being given to such an implication; that plaintiff has received only $6,909.70 since she left defendant (Tr. 256, 258, 261, 359); that defendant ever admitted "waking up in Denver and not knowing how he got to Denver."

Since the 18th day of October, 1964, the date plaintiff left defendant, plaintiff has received from defendant the sum of $7,214.00 (Tr. 256, 258, 261, 359 and the lower court's order of December 21, 1965).

POINT I. THE DISTRIBUTION IN EQUITY MADE TO PLAINTIFF-APPELLANT IS EXCESSIVE AND NOT SUPPORTED BY THE LAW.

Under our law, the marriage relationship is one of complete mutuality, and unless each party is wholly and completely bound by marriage, neither party is married nor in any way bound to the other. There are no degrees of marriage.

Our court in *Jenkins v. Jenkins,* 107 Utah 239, 153 P. 2d 262, said:

> Under Section 40-1-17, U.C.A. 1943, the court clearly had the authority to declare the purported marriage void. Where the marriage has

> been entered into in good faith by both parties or where, as here, both parties knew of the interlocutory decree of divorce which had not yet become final, the court in the exercise of its equitable power has jurisdiction to require an equitable distribution of the property acquired during the time the litigants were cohabiting as man and wife.

Although the court in the *Jenkins* case was not called upon to decide what form an equitable distribution should take, some of the cases which it cited did so, and in all of them from states where, (as in our own), the common law is the general rule of decision, the guidelines for solving the distribution of property after a void marriage are set down.

These guidelines were set down in ***Fuller v. Fuller***, 33 Kan. 582, 7 P. 241 (1885):

> "It is our opinion, however, that in all judicial separations of persons who have lived together as husband and wife, a fair and equitable division of their property should be had, and the court in making such division should inquire into *the amount that each party originally owned, the amount each party received while they were living together, and the amount of their joint accumulations.*" (Emphasis supplied).

That the stated points of inquiry are the guidelines is amply demonstrated by a long line of cases from many jurisdictions from the date of the *Fuller* case to the present. In all of these cases the contributions of the parties are scrutinized.

In the case of *Werner v. Werner,* 59 Kan. 399, 53 P. 127 (1898), the court said:

> While Emil Werner had considerable property at the time of the marriage and Rosa had none, the testimony tends to show that *the property which they have now is largely the result of their join labor and earnings. She was active, industrious and faithful and besides household work, she was an efficient aid in conducting and carrying on the different branches of business in which he was engaged.* In the early days she performed labor of the hardest and most menial character and throughout the 22 years in which they lived together as husband and wife *she was diligent, tireless and economical in building up a business and in gathering up the property which they held at the time of the trial. She appears to have been a valuable assistant in managing the business and in caring for the property in which their earnings were invested.* A portion of the time the title to the property was in her name, but at the time of the separation he held the legal title to most of it. The fact, however, that the legal title stood in the name of one or of the other of the parties does not prevent a just distribution of the property jointly contributed and in fact jointly owned by both. (Emphasis supplied).

Certainly it cannot be said of plaintiff in the case here for decision that she was "active, industrious and faithful"; that "she was an efficient aid in conducting and carrying on the different branches of business" in which Mr. Buck was engaged. Nor, it is submitted, does the record show her to be "diligent, tireless and

economical" or "a valuable assistant in managing the business and in caring for the property in which * * * earnings were invested." Alice Buck had no earnings and invested no money in the property. The purported Mrs. Buck did what she wanted to (Tr. 388). She didn't earn money, she spent it. She didn't manage the business, she used it. (Tr. 309, 311, 312.) She objected to the purchase of the tavern, and the realty on which it is located (Tr. 238, 308).

In the case of *Buckley v. Buckley,* 50 Wash, 213, 96 P. 1079, 1082 (1908), the court found that the plaintiff there had helped acquire and save the property and said, " . . . the court had authority to decree . . . the division of the property which has been *jointly accumulated* by the parties." (Emphasis supplied). Alice Buck objected to the purchase of the business (Tr. 308) and to the purchase of the realty on which the business stands (Tr. 238).

In the case of *Coats v. Coats,* 160 Cal. 671, 118 P. 441, 36 L.R.A. (N.S.) 844 (1911), the court held that *where the purported wife had contributed* to the acquisitions of the parties after marriage and before annulment, she was entitled to a share. It is interesting to note that the jurisdiction of the *Coats* case is one where the common law is not the basis for general decision for property rights acquired during a purported marriage, and even then, the court adhered to the contribution theory.

In the case of *Batty v. Green,* (Mass.) 92 N.E. 715

(1910), the litigants made *joint contributions* to a fund from which property was purchased, and the court found that because of the joint contributions an equitable division would be had. A master determined the fractional contributions of the parties to the whole and the award was made on that basis. Again, it is to be noted that in the Buck case there was *no joint fund* and plaintiff-appellant Buck contributed no funds and that her contribution in work was small indeed compared to the contribution of Mr. Buck (Tr. 309, 316, 324-325).

Another Massachusetts case, *Morin v. Kirkland,* 115 N.E. 414 (1917) tells the story of a void marriage where the plaintiff *mingled her wages* with the money she received from the purported husband for household expenses. Realty was purchased with this money and upon the death of the purported husband, the court held the property to be hers. Plaintiff-appellant Buck had no wages, and mingled no funds (Tr. 39-40).

In re Brenchley, 96 Wash. 223, 164 P. 913 (1917), depicted a situation where the purported wife *kept borders and a lodging house* and *was a nurse and a midwife* and *contributed her earnings to the payment of the obligations* which purchased the property which was the subject for division. Because of the contributions she made *from her individual earnings,* the court made an award to the purported wife.

Knoll v. Knoll, 104 Wash. 110, 176 P. 22 (1918). Here the court found that the purported wife had faithfully performed all the duties of a housewife; *she had*

worked as a seamstress; she had provided for her own expenses, and that the property was acquired by the *joint efforts* of the parties, and the court held that if she had not supported herself the husband would have had to do it. On such bases the court made its award. The attention of the court is directed to the fact that not only was plaintiff-appellant Buck supported by Mr. Buck, but she was supported in a fashion well above the average; and that plaintiff-appellant Buck had no outside employment.

Krauter v. Krauter, 79 Okl. 30, 190 P. 1088 (1920). In this case the court made an equitable division of the property where it was shown that at the time of the purported marriage the parties had no property but worked and toiled together for 15 years, saving about $16,000 over and above their indebtedness. The court also found that the woman assisted in accumulating the property which was acquired by the savings of their *joint efforts.* Again, the court's attention is directed to the fact that at the inception of the purported Buck marriage, Mr. Buck had substantial assets, his purported wife had none; and that such joint efforts there were were small indeed compared to the individual effort of Mr. Buck.

In the year 1921 another Washington case, *Powers v. Powers,* 117 Wash. 248, 200 P. 1080, found that the purported wife had received in her own name a patent to certain lands upon which she had filed a timber and stone claim. *Because she had made a contribution* to the

acquisition of the property, the court allowed her *such portion* of the property as to which she was equitably and justly entitled.

An interesting void marriage case is that of ***Fung Dai Kim Ah Leong v. Lau Ah Leong,*** (1928) (C.A. 9th Hawaii) 27 F.2d 582, Cert. den., 278 U.S. 636, 73 L. ed 552, 49 S.Ct. 33, wherein the plaintiff and a man entered into a joint marriage. When their association began, the man was penniless. ***With money contributed by the woman a business was begun*** which resulted in the accumulation of several hundred thousand dollars. The court in setting out the formula for distribution said, "Here, we think, it will be proper for the court . . . to take into consideration *the relative contributions of property, and of personal service in point of value,* made by the two parties in the accumulation of the property standing in the defendant's name, *the amount and value of such property at the time their defacto marital relations ceased,* the amount of property accumulated by plaintiff during the same period and standing in her name, . . ." In the ***Fung Dai*** case the woman worked long and hard and provided money for the man to get his start. This, of course, is the diametric opposite of the situation obtaining between Mr. Buck and his purported wife.

The case of ***Reese v. Reese,*** 132 Kan. 438, 295 P. 690 (1931) was a case where the putative wife *contributed funds* previously given her in a *property settlement,* and from an inheritance, which funds were directly chan-

neled into the man's business; she also assisted him in other ways. On this state of facts the court made an award to the woman *based upon the amount of her contributions*. In the Reese case the contributions of the woman were substantial, but in the Buck case, it is submitted, they certainly do not meet such a test.

An Indiana case decided in 1942 was that of *Sclamber v. Sclamber,* 220 Ind. 209, 41 N.E.2d 801, wherein, at the time of the marriage, the court found the man had $47,750 and owed $23,000. When the parties separated 11 years later, the man had $21,750 and owed $5,500. During this time the woman performed the usual duties of a housewife, she was economical, and aided and assisted the man in reducing his indebtedness by $17,450, for which she received no compensation. The court said she was entitled to equitable relief and gave her a judgment of $1,000. In the Buck case the testimony is to the effect that not only was plaintiff-appellant Buck well-maintained, but that she was the consistent recipient of large sums of money and the beneficiary of many trips.

The case of *King v. Jackson,* 196 Okl. 327, 164 P.2d 974 (1945) again leans heavily on the guidelines set forth in the Fuller case. The court found the evidence of the woman convincing to the effect that during most of the time she had lived with her purported husband *she was actively employed as a teacher, worked as a domestic and contributed most of her money toward acquiring and improving the property in question.* The court decreed to her an award of one-half interest but

impressed her judgment with an amount equal to one-half the taxes paid by the defendant.

The case of *Schwartz v. United States,* (Maryland) 191 F.2d 618 (1915), involved a situation wherein the purported wife of a void marriage *purchased with her own money* land which was conveyed to her and her purported husband by a deed intended to convey an estate by the entireties. Because of her total contribution, the title to the land was impressed with a trust in her favor.

The California void marriage cases are interesting because when they divide the property equally they do so because they subscribe to a rule which denotes accumulated property as quasi-community property pursuant to the influence of the Spanish law. The case cited by plaintiff-appellant, viz., Schneider v. Schneider, 183 Cal. 335, 191 P. 533, 11 A.L.R. 1386 (1920), is an example. Earlier cases have based their decision on the common law and the contribution theory of which Coats v. Coats, *supra,* is an example. The later California cases do not subscribe to the equal division theory. Such a case is that of *Keene v. Keene,* 21 Cal. Rep. 593, 371 P.2d 329 (1962). In addressing itself to the question of what are joint contributions, or contributions sufficient to entitle a woman to participate in a share of the property, the court in referring to Vallera v. Vallera, 21 C.2d 681, 134 P.2d 761, 763, said:

> If a man and woman live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumula-

tions, equity will protect the interests of each in such property (citations). Even in the absence of an express agreement to that effect the woman would be entitled to share in the property *jointly accumulated in the proportion that her funds contributed towards acquisition* (citations)". (Emphasis supplied). We do not depart from that proposition but here the trial court found as stated in its memorandum decision, "no evidence of financial contributions by plaintiff toward the property here concerned nor is there evidence sufficient to support any agreement upon which a joint enterprise or co-partnership could be based". In an effort to bring her case nevertheless within the purview of the just quoted language from Vallera, plaintiff stresses a finding of the trial court concerning the nature of her services during the period of co-habitation, and on this basis contends that in Vallera "When it used the word 'funds' the court did not mean 'money' only. It referred to any contribution made by the woman, at least to any contribution other than her services as a housekeeper, cook and homemaker for which she may have been compensated either wholly or in part by support furnished.

The contention is without merit. When a word is used which has a well established meaning in common parlance such as "funds" the necessities of intelligible communications require that it be assumed that the user intended that common meaning. There is no mystery surrounding the word here mentioned questioned by plaintiff. The dictionary defines it as "available pecuniary resources ordinarily including cash and negotiable paper", (Websters New International Dictionary 3rd Ed. 1961, page 921), and in a

legal context the courts have also taken it to include property of value which may be converted into cash (citing cases). A simple reading of both the Vallera opinions demonstrates that the members of the court intended and understood the word "funds" to be used in this common everyday sense. Indeed the dissenting opinion in Vallera expressly stated it to be "the conclusion of the majority opinion that in order to sustain the judgment of the trial court, there must be proof of a definite *monetary* contribution by the plaintiff in the form of separate *property* or a contribution of her earnings as a waitress or from other employment outside the home." (Italics added) (Cases cited). Plaintiff's reliance on subsequent decisions of this Court and the District Court of Appeal which cite Vallera is misplaced, as none extends the word 'funds' beyond its intended, commonsense meaning."

Another recent case dealing with this problem is that of *Anderson v. Stacker,* (Missouri Report Officially not published) 317 S.W.2d 417 (1958). The court there had under consideration property which had been conveyed to plaintiff and defendant as husband and wife, although they were not married, and the decision was that a tenancy in common was created. But since there was no proof that the woman had contributed any sum to the purchase price or to the payment of notes secured by trust deeds on the property, the man was entitled to judgment quieting title to the real property in him, subject to an adjustment for repairs and improvements made by the woman. " . . . *Upon this record it may only be said in accordance with the general*

rule, that the trial court has found and apportioned the interests of the parties proportionately to their contributions to its acquisition. . . . Subject to an adjustment for repairs and improvements, the judgment quieting the title to the real property in (the man) is affirmed and remanded; . . . " (Emphasis supplied). It is to be noted that in the Stacker case the woman advanced some $300 for the purpose of improvements and repairs. In addition, she worked all during the purported marriage at a job away from home.

Some talk has been made by plaintiff-appellant about the joint tenancy property. The plain answer to this is to be found on pages 341-343 of the transcript. The defendant said:

> Q. Why are they in joint tenancy?
>
> A. Well, I figured that Alice was my wife. She kept—she always figured that she was (gypped) in life and she was worried about that, if something happened to me, if she was going to get what I had, and there was arguments—arguments—so I decided to put these in her name; but she never had any custody of them.
>
> They were in the Savings-Deposit box in my name; all they were doing is protecting her in case I would die; then, the Safety-Deposit box be opened up and it could be given to her.
>
> Q. Did you—were these stocks always in joint tenancy?
>
> A. To begin with, I bought them in my name; not these, but others.

Q. Was this a voluntary action on your part that you put them in joint tenancy?

A. I would say not so, but I had to have peace and quietness in the house.

Q. Why wouldn't you have peace and quietness in the house?

A. She wanted protection in case I died; so, to have peace and quietness, I gave her protection in case I died, by putting her name on my stocks.

Q. What would she do when her name wasn't on the stocks?

A. She would pout. I bought a couple of shares of Budd and different things. She would pout, and, when the dividend checks would come, she would look at me nastily and throw them on the kitchen table. "This is your stock," she would say.

It is submitted that the only tenable determination which can be made is that the property in question was placed in joint tenancy under the mistaken belief of Mr. Buck that plaintiff-appellant was his wife.

Facts similar to those in the Buck case, involving a Mexico divorce and a mistaken gift, were developed in the case of *Wood v. Wood,* 245 NYS 800, 826 and 41 Misc. 2d 95, 31 A.L.R. 2d 1259 (1963). The New York court, at page 826, said:

> The fourth counterclaim relates to the "joint ownership" of the apartment. The defendant bought the apartment on March 31, 1960 for $165,000.00; on December 19, 1961, with the

consent of the Landlord Corporation (effective January 1, 1962), he transferred the ownership from himself to "Walter A. Wood and Helena A. Wood, his wife, as joint tenants with right of survivorship". The transfer was by way of outright gift. The defendant, on the assumption his marriage is annulled, asks to have the property restored to him. He does so on the ground that the transfer was made in the belief that he was validly married to the plaintiff; that he otherwise would not have done so. I think he is entitled to the relief he asks. It is unthinkable that the gift would have been made, except for a belief in a subsisting marriage. It was already the matrimonial home; the plaintiff called it "her home" at least during her lifetime without any documents of title and it was only because she was believed to be the wife, entitled to the "security" of a wife, that the transfer was made. To be sure the defendant did not say in so many words that he would not have made the transfer if he had not believed the plaintiff was legally his wife. His assertion to that effect would not be determinative; but the absence of a strict formula here should not prejudice him. It was not any statement by the plaintiff upon which he relied in making the transfer. That was done upon a mistaken belief as to his status. Both believed the relationship to be that of husband and wife; there was no fraud upon the part of either one—but there were no equities in favor of the wife such as existed in *American Surety Co. of New York v. Conner,* 251 NY 1, 166 N.E. 783, 65 ALR 244.

POINT II. THE DISTRIBUTION IN EQUITY MADE TO PLAINTIFF-APPEL-

LANT IS EXCESSIVE AND NOT SUPPORTED BY THE EVIDENCE.

The principal question is what contributions to the acquisition of the property were made by plaintiff and defendant.

There is no question that defendant brought with him, at the time of the purported marriage, assets amounting to at least $34,400.00 to $36,400.00. These consisted of:

Rental property inherited from his mother situated in Long Beach California (Tr. 292)	$14,400.00
Bonds from money inherited from his mother with a face value of (Tr. 293)	15,000.00
Bank account consisting of income from rental property and other money deposited in the Farmers and Merchants Bank, Long Beach, California (Tr. 298)	4,000 to 6,000.00
Water bond from his inheritance (Tr. 298, 199)	1,000.00
	$34,400 to $36,400.00
In the succeeding years of this association, from 1946 to 1963, the income from the rental property in Long Beach amounted to another (Tr. 295, 296. Ex. 15-D and income tax returns)	27,371.26
Bank interest and stock dividends accruing in the succeeding years of the association added another (Tr. 296, 297, Ex. 16-D)	23,014.76
	$ 50,386.02

When the parties moved to Salt Lake City, defendant purchased a beer tavern with money from his inheritance (Tr. 302, 303). In addition, the defendant purchased a building lot for $700.00 in the early part of 1947 with money from his inheritance (Tr. 300, 301). In 1948 a residence was purchased, and the down pay-

ment made consisted of $4,000.00 in bonds from his mother's inheritance and the lot for which he received a credit of $1,000.00 (Tr. 301, 302).

Thereafter, beginning in about 1954, defendant began investing his money in corporate stocks. On page 305 of the transcript he says:

> " . . . I finally took all my savings out and all my money in the safety deposit box that wasn't working for me, and I put it all in stock."

Under examination by plaintiff's counsel (Tr. 210) in answer to the question of where the money to buy the stocks came from, defendant said,

> " . . . from income off the property in California; from interest that I had in the banks; I had money in the banks. I had money in different banks. I had money in the Prudential Bank. I had money in the Continental Bank that I had spread around from my Long Beach property; also the accumulation of interest; that is what I bought the stocks with."

The defendant bought and traded the stocks (Tr. 306). He was the manager and business head in the acquisition of the stock portfolio. Plaintiff admits he bought and sold the stocks (Tr. 25). But in other testimony, plaintiff says she purchased and sold various stocks (Tr. 26). This last statement is categorically denied on direct and cross-examination by witness Healy, the account executive who handled all of defendant's stock business (Tr. 438, 439).

The realty on which the tavern business was conducted was purchased in 1963 for $34,500.00, and in answer to the question, ". . . and do you recall how the money was put together to buy that?", defendant said:

> "We sold some stocks that was in both our names. I sold some stock that was in my name, and I also drew around $4,000.00 cash from the bank in my name." (Tr. 302-304).

In 1957 a duplex was purchased for $5,500.00 cash, and defendant said he had savings accounts sufficient to make the purchase (Tr. 303).

The testimony of all the witnesses, it is submitted, confirms two statements made by defendant — 1) on examination by adverse counsel, viz.:

> "I would never have had any of this stuff if I hadn't had bonds to begin." (Tr. 241).

and 2) on direct examination:

> " . . . we wouldn't have had anything if it wasn't for the inheritance." (Tr. 345).

WHAT WAS DEFENDANT'S CONTRIBUTION IN WORK AT THE BEER TAVERN?

Defendant has operated the business from the time it opened to the present and is yet operating it (Tr. 308). From the opening of the business to the present, defendant has worked a shift at the business in addition to all the other duties which devolved upon

him as the manager (Tr. 319) — the bookkeeping, the maintenance, the janitor work, the gardening work, purchasing. None of this testimony is denied, neither directly nor inferentially.

The defendant testified that during the years 1946 (the inception of the business) and 1953 he worked at the tavern as a bartender for at least forty hours a week, and in the performance of other duties connected with the management of the enterprise at least thirty additional hours a week; that between the years 1953 and 1959 he spent at least thirty-two hours a week there as a bartender and thirty-five additional hours a week in performance of his other duties; that between 1959 and October 18, 1964, the date plaintiff left defendant (Tr. 317), he spent at least twenty-four hours a week as a bartender and forty additional hours a week in the performance of his other duties; that from the 18th of October, 1964, to the time of the tiral he worked at the tavern as a bartender for thirty hours a week and an additional forty hours per week in performing his other duties, which always consisted of keeping the books, opening the business every day, pulling weeds, watering, scrubbing the floors, painting, buying records for the juke box and putting them on, purchasing supplies, keeping abreast of current business affairs to enable him to regulate his business, and checking on his employees to see what was going on (Tr. 325 through 327). The defendant's testimony in this regard is confirmed by all the witnesses who were at the tavern throughout the nineteen years often enough to know.

Mr. Sheridan, whose employment began in 1946, says that Mr. Buck worked regular shifts at that time, and that plaintiff did not work on a regular basis (Tr. 395, 400), and that she was at the tavern more often as a customer.

Again, Robert Gull, who was employed at the tavern from 1958 to 1963, testified that Mr. Buck was at the tavern every morning, and when the business was without a day bartender, he would take his place; that Mr. Buck many times worked a full shift, and that Mr. Buck did not spend very much time away from the Buckeroo (Tr. 419, 421). He also stated that the work of plaintiff at the tavern was of no great extent, and that the only time she worked was when she relieved Mr. Buck (Tr. 419).

Witness Thatcher stated, on cross-examination, that,

> "It was Mr. Buck who took care of the whole business, who did everything necessary to be done,"

that "he was there all the time" (Tr. 405, 408). She also testified that plaintiff was never there on a regular basis, and that plaintiff was there more often as a customer than as a worker (Tr. 405).

Witness Tolman, a frequent customer at the tavern, testified that Mr. Buck was always there checking on something (Tr. 444).

NOW, WHAT WAS PLAINTIFF'S CONTRIBUTION TO THE ACQUISITION OF THE PROPERTY?

Plaintiff herself testified that at the time she and Mr. Buck first came to Salt Lake City from California she had no assets or other things of value, and during the entire time she cohabited with Mr. Buck she had no outside employment; that she was not paid any wages from anyone other than Mr. Buck; that she hadn't received any money (other than from Mr. Buck) from anyone else; and that she did not "... invest any of (her) own funds in any of the property" acquired by Mr. Buck. Her answer was,

> "None of my own funds." (Tr. 40).

She further stated, in answer to a question from her counsel, that there was no co-mingling of her funds with those of Mr. Buck prior to coming to Salt Lake City (Tr. 39). She did attempt to establish that she had $700 in cash in her purse when she arrived in Salt Lake City. She later stated that she

> "... spent my money—what I had—on clothes and on—when we first came here, we just had the suitcase; ..." (Tr. 70).

Shortly after their arrival in Salt Lake City, the plaintiff was hospitalized, and Mr. Buck paid the hospital bills. He testified that she never told him about this purported $700, not then or in all the years of the association (Tr. 300).

THE PLAINTIFF HAVING MADE NO CONTRIBUTION IN FUNDS TOWARD THE ACQUISITION OF THE BUSINESS, THE RESIDENCE, THE DUPLEX, THE STOCKS, OR THE REALTY ON WHICH THE BUSINESS IS LOCATED, WHAT WAS HER CONTRIBUTION IN WORK TOWARD THE ACQUISITION OF THE PROPERTY?

The trial court correctly found that the acquisition of this property is almost entirely because of the efforts and contributions of defendant, and that plaintiff had nothing to do with the acquisition of, or reinvestment of, the stocks; and that "Plaintiff's contribution toward the properties acquired during the cohabitation in addition to well executed duties usually discharged by a wife, amounted to help at the Buckeroo Lounge, but not on a regular basis during the latter years of their cohabitation" (Findings of Fact). It is submitted that her work at the lounge was not on a *regular* basis at any time.

Witness Sheridan, one of the first bartenders, stated that the plaintiff didn't "pull a regular shift" in 1946; that she had a bad effect on the customers when she was there; that she was there more often as a customer or visitor than as a worker and that she had a mean disposition (Tr. 395-397). This is from a witness who worked for Mr. Buck in 1946 and has visited with Mr. Buck only once or twice in the ensuing nineteen years.

This testimony is buttressed by that of other wit-

nesses who worked at, and frequented the tavern, often enough to make reliable observations. Witness Gull stated the plaintiff did very little work at the tavern, and that she was mean and obnoxious when drunk (Tr. 419, 425). The testimony is that the plaintiff was never there as a worker (Tr. 404); that she was mean (Tr. 412); that she was vicious (Tr. 442); that she used foul language (Tr. 452).

In addition, the testimony is that plaintiff was not familiar enough with the operation of the tavern to know the prices of the articles sold (Tr. 363); that she never managed the place (Tr. 309). Mr. Buck's testimony is that she came down and helped him out between April and the first of July in 1946 — that she would relieve him for a few hours, and that sometimes she worked quite a few hours (Tr. 316). That between 1946 and 1953, the plaintiff averaged about twenty hours a week; and between 1953 and 1959, plaintiff averaged about ten hours a week at the tavern; and that from 1959 to October, 1964, when plaintiff left defendant she would have averaged about five hours a week; and never at any time was her work at the tavern on a regular basis (Tr. 324, 325).

The plaintiff attempted to show that the time she worked equaled that of Mr. Buck, and that "recently" she had to work numerous times (Tr. 12, 13). Then she tried to show that her work at the tavern over the years was more than that of Mr. Buck (Tr. 55).

The overwhelming weight of the evidence is against

her, and it appears apparent that the Trial Judge, who heard and saw her testify, did not believe her.

There is testimony to the effect that she was a good cook and kept a good house. Certainly this was not a difficult task in view of the fact that there were no children, no financial worries, and no one to care for but herself and Mr. Buck. Even at that, she was not such a good housewife as to get out of bed to prepare Mr. Buck's breakfast (Tr. 53). Plaintiff did what she wanted to (Tr. 388).

HOW WAS THE PLAINTIFF TREATED DURING THE NINETEEN YEARS OF THE ASSOCIATION?

The direct testimony of her witness is:

> "Mr. and Mrs. Buck lived well. They didn't deny themselves any of the luxuries that they obviously could afford. Mr. Buck had Cadillacs, and he liked to make trips, and they had exactly what they—to all appearances—had exactly what they wished in their home; had a home which was well taken care of inside and out, and lived and ate and entertained, and, generally, lived in a good fashion—in fine fashion." (Tr. 118).

The plaintiff's daughter testified that her mother and Mr. Buck lived well; that her mother had been well taken care of; that she had been supplied with food and clothing, entertainment and trips above the average that people have. That her mother received gifts of

money from Mr. Buck in the hundreds of dollars (Tr. 174, 175).

The plaintiff herself testified that any time she asked Mr. Buck for money, he gave it to her; that he gave her as much as $500 at a time, and that there were other large sums he gave her, and that he gave her money for clothes (Tr. 81). She also testified that in the beginning he gave her $35 a week for household expenses; that later on he gave her $50 a week; that she didn't have to pay the utilities out of this money; that there were just the two of them at home, and that in addition to these sums she received other large sums and money any time she asked for it (Tr. 80, 81). Mr. Buck's testimony is that the only time he ever refused her was when she asked him for a mink coat. The clothes closets in plaintiff's home were full of her clothing (Tr. 335).

His uncontradicted testimony is also that, excepting those times when her children stayed with them, there were just the two of them at home; that they ate well; that they went to plays that came to town, movies; that he bought her a boat, golf clubs, bowling balls; that throughout the period of their association he'd taken her out to dinner at least once a week. His statement is:

> " . . . maybe, I missed a week, though, so I would average it at least once a week, though, at the very least." (Tr. 334-337).

The plaintiff was also the beneficiary of a trip to Europe via the Queen Mary and return via air. It

addition to the trip to Europe, there were trips to Mexico City, to Vancouver, Washington, *"many times to California to see her kids . . ."*, to Las Vegas, to Denver, to Reno, to San Francisco. Mr. Buck paid all the expenses (Tr. 337, 338). Plaintiff herself testified they took trips to California "very frequently" (Tr. 60).

That he gave her other money in large amounts is uncontradicted and corroborated, as is the fact that he paid her hospital bills, her dental bills, her medicine bills (Tr. 340, 341, 174, 175, 81).

Other witnesses testified that the plaintiff always appeared to be well dressed, and that she never seemed to lack for money (Tr. 406, 412, 419, 420, 425, 426).

THE BRIEF OF PLAINTIFF-APPELLANT.

Plaintiff argues that there is error in allowing defendant $70,386.02 as a cash contribution. It is submitted that the testimony and the exhibits referred to amply sustain the court's finding in this regard.

Plaintiff also argues that defendant should be charged with the gambling losses. It is submitted that the court correctly found that these balance out each other, and the evidence is that plaintiff and her friends accompanied him on most of the gambling trips; that plaintiff gambled as much as he did, and throughout the years of the association he had lost no more than

$3,000 and that her losses equaled that figure (Tr. 358). In addition, there is ample testimony showing that Mr. Buck won large sums of money (Tr. 356, 180).

Plaintiff also claims defendant's share should be charged with the loss of the 1959 Cadillac. It is error to do so in view that the Cadillacs were carried as a business expense and used as a front for the business. The testimony at page 264 of the transcript is:

> Q. During the marriage, Mr. Buck, you have bought many things that you liked yourself that were quite expensive items, such as Cadillac automobiles, have you not?
>
> A. That is business expense.
>
> Q. Well, you have bought them because you liked Cadillacs?
>
> A. I like business.
>
> Q Well, the Cadillac doesn't help your business does it?
>
> A. It does.
>
> Q. In what way?
>
> A. It is a front.

Plaintiff's witness testified that because of the high cost of insurance premiums, Mr. Buck said he was a self-insurer (Tr. 120).

In response to plaintiff's contention that it was error on the part of the lower court to find that the acquisition of the property is almost entirely because of

the efforts and contributions of the defendant, it is submitted that the evidence, just that part of it alluded to in this brief by transcript number, conclusively establishes that such is the case. In connection therewith, it should be said in answer to plaintiff's statement on page 10 of her brief to the effect that nearly all the stocks were purchased by moneys taken from the net profits of the buisness, that it must be apparent from the evidence alluded to, as aforesaid, that nearly all the net profits of the Buckeroo business were expended by defendant for himself and plaintiff in financing *the many trips they took, the entertainment they had, the above-average standard of living they enjoyed.*

In answer to Point VII of plaintiff's brief with respect to the value of the business, defendant directs the court's attention to the testimony at pages 73, 74, 350 and 351 of the transcript. Plaintiff-appellant there testifies she didn't know anything about the purported offer for the sale of the tavern. Her testimony is:

> Q. . . . who made the offer for the purchase of the Buckeroo?
>
> A. I wasn't there. I was home. Mr. Buck told me about it.
>
> * * *
>
> Q. Did you favor the sale of the Buckeroo—
>
> A. Yes.
>
> Q. —to Rey?
>
> A. Did I what?

Q. Did you favor the sale of the Buckeroo for $50,000?

A. Yes; I asked Buck why he didn't take it.

Q. Did you know anything about Rey's credit rating?

A. No, he was in there quite often. He was speaking of going into business, is all I know. I don't know nothing—how would I know? No, sir, I don't.

Q. Yet, you told Mr. Buck to go ahead and take it?

A. Well. he certainly would not have taken it if the man hadn't had the money.

Q. So you really relied on Mr. Buck's judgment as to what to do with it, didn't you?

A. Well, yes: I would, definitely, in that case.

(Tr. 73-74)

Mr. Buck testified:

Q. Calling your attention to an offer for the purchase of the tavern which was referred to two or three days ago in the testimony — an offer of $50,000—did you ever have a bona fide offer of $50,000 for the purchase of the tavern?

A. A bona fide offer?

Q. Yes; good-faith offer?

A. No.

Q. Do you have any idea where this $50,000 offer came from or how this arose—how the idea came about?

A. It was just frivolous talk.

* * *

Q. Did he deposit any earnest money?

A. Not a penny.

* * *

Q. Did he ever come back and make further offers to purchase it?

A. No. **(Tr. 350-351)**

There seems to be no real question about the fact that plaintiff did not have anything to do with the acquisition or reinvestment of the stocks. She stated none of her own funds were invested in any of the property (Tr. 40). That Mr. Buck bought the stocks (Tr. 25). That testimony, together with that of Mr. Buck (Tr. 306) and that of Mr. Healy (Tr. 438, 439), should set that matter at rest. That the great majority of the money from the Buckeroo was used as living expenses is sustained by testimony at pages 208, 209, 210 of the transcript.

In answer to plaintiff's Point VIII, it is to be noted that the total acquisition cost of the properties in evidence amounted to $108,200.88 (Tr. 307). Of this amount $70,385.92 has been traced to the assets and business acumen of Mr. Buck. The difference, viz. $37,815.96 came from the profits of the business (Tr. 328) (Exhibits 15-D, 16-D, and the income tax returns).

WHAT PART OF THIS $37,000 IS TRACEABLE TO THE EFFORTS OF PLAINTIFF — FOR SHE MADE NO MONETARY CONTRIBUTION?

For, if plaintiff can recover at all, she will do so on the value of her contribution in acquisitive effort. It is submitted that her efforts toward the acquisition of this money compared to the efforts of Mr. Buck were small indeed.

Plaintiff makes a point that Exhibit 15-D shows more of an income to defendant than do his income tax returns. Plaintiff errs in not realizing that the depreciation on the Long Beach property, which served as a tax deduction, would be a direct addition to the income, and it is submitted that 15-D accurately reflects the figures on the income tax returns. It is also to be noted that the amount of money paid out by Mr. Buck for the support of his son by a prior marriage was reflected directly back into his income through a tax exemption (Income tax returns)

With reference to the value of the business, the testimony is that the license under which Mr. Buck operated and was operating at the time of the trial was not transferrable — he couldn't sell it; that he was forced to pay an exorbitant price for the real property in order to stay in business (Tr. 304), and that the additions to the tavern were necessary. But in the final analysis the business has no market value other than the real property on which it stands; his beer license is not transferrable (Tr. 317). In addition, there is no evidence that the automobile has a value of $7,800.00.

With respect to the bank account of approximately $9,000.00, this was money which came to the defendant

after plaintiff left him on October 8, 1964, and the court found, and rightly so, that plaintiff had nothing whatever to do with the business after she left (Tr. 364, Memorandum Decisions).

Plaintiff, in her Point V, makes some point about the stocks being in joint tenancy. The plain answer to that is that Mr. Buck thought the plaintiff was his wife; that he was mistaken, and that he would not have placed any property in joint tenancy but for the fact that he did think the plaintiff was his wife, and to keep peace at home (Tr. 342 through 344).

Plaintiff, at the trial and in her brief, made much of defendant's drinking and attempted to show that defendant's drinking accounted for a great waste of assets. The testimony does not support her attempt, and it appears apparent that the Trial Judge didn't believe her, and I might add, the wise financial management with which defendant made money does not countenance such a claim. It is submitted that the following itself is a complete answer to any such inflammatory claims. Under cross-examination, the defendant testified:

> Q. Who has made the purchases of the whiskey that you have consumed?
>
> A. I have.
>
> Q. Would you have an estimate as to how much you have spent per week?
>
> A. I couldn't even guess. When you say "A great deal of whiskey," now, there has been

months and months and years that I haven't drank.

I have friends that, at the Elks Club, I was there eight years before they knew I took a drink. I ordered one drink, and he says—my friend says, "I never knew you drank."

I have had bar-tenders that worked for me for years without knowing I drank.

This is just a great exaggeration. If I drank a tenth as much booze as I have heard here in Court, we wouldn't have this dough to argue about.

I am not an alcoholic in that sense, at all, but I have, a couple of times, through aggravation and arguments with her, overdrank.

But that's been for a week; not for eight weeks —and twice—not over—in nineteen years.

(Tr. 381-382)

With reference to plaintiff-appellant's Point IX and her proposed accounting, it appears that the only other observations about its accuracy that need be made are:

Where does it show the earning power of Mr. Buck's capital contribution, and where does it show that plaintiff-appellant made any contribution? Where does it show the relative contributions in acquisitive effort? How did plaintiff-appellant build this estate?

While accountings in matters such as these do not lend themselves to the precision of a mortgage note, the following accounting is offered as being commensurate

with the facts to a degree unattainable by either plaintiff-appellant's accounting or that of the lower court.

ACCOUNTING

1. Stocks	$107,435.00	
2. Business & Realty & Additions	34,500.00	(Tr. 304-317)
3. Residence	14,500.00	(Tr. 348, 349)
4. Duplex	7,000.00	(Tr. 350)
		No reference on Tr. 237
5. Additions to Buckeroo	0.00	See No. 2 supra
6. Automobile	4,000.00	(Tr. 267) Only evidence
7. Bank account When plaintiff left this is the amount that was in the bank	74.00	(Tr. 358) The money, testified on Tr. 261, came after plaintiff's departure and she did nothing toward its acquisition
8. Undeposited dividends	0.00	No evidence of this. Plaintiff's reference to Tr. 236 is error
8a. Deposited dividends $1,862.00, but came after plaintiff's departure		(Tr. 258, 268)
9. Net income since Oct., 1964	0.00	Any income to which plaintiff would have a claim would be income which she helped produce (Tr. 364)
Total Worth	$167,509.00	

Acquisition cost of all assets	108,200.88	(Tr. 307)
Funds contributed:		
Defendant	70,386.01	(Tr. 328)
Plaintiff	0.00	
Funds attributable to profits from business	$ 37,815.87	

What ratio does the contribution in funds by Mr. Buck bear to the total acquisition cost?

Defendant: 65%, or $70,386.01 Plaintiff: 0.0%

The plaintiff's contribution in acquisitive effort, if any, is represented in a portion of the balance of $37,814.87, which is the remaining 35% of the acquisition cost. What portion?

Plaintiff: 17.4% ..... $ 6,579.79
Defendant: 82.6% $31,235.08

Mr. Buck testified (Tr. 325, 326, 327) as to the amount of work each put in at the tavern, and the credibility of this testimony is supported by that of other witnesses (Tr. 395, 397, 399, 404, 408, 417, 419, 424, 434, 442, 443, 444, 449, 450), and not discounted anywhere except by plaintiff when she said, in exaggeration (it is suggested) that she worked more than Mr. Buck (Tr. 55).

His testimony shows:

Plaintiff worked:

1946-53 about 20 hours per week
1953-59 about 10 hours per week
1959-64 about 5 hours per week

Total hours plaintiff worked: 35 hours

Defendant worked:

1946-53 about 70 hours per week
1953-59 about 67 hours per week
1959-64 about 64 hours per week

Total hours defendant worked: 201 hours

1964-66, again, 70 hours per week

The ratio of plaintiff's effort at the tavern to that of Mr. Buck's is 17.4% — applied to that portion of the cost of acquisition not attributable to the contribution in money, and this assumes, to plaintiff's benefit, that her effort was as productive as his, which, defendant suggests, it certainly was not. It shows plaintiff's effort produced $6,579.79.

$\frac{35}{201}$ equals .174

Plaintiff: 17.4%

Defendant: 82.6%

Therefore, 65% of the value of the assets is attributable to the money contribution of Mr. Buck alone, and 35% of the value of the assets to the contribution in effort of both parties.

Value of assets	$167,509.00	
Less 65% (attributable to Mr. Buck's contribution in funds)	108,870.85	
35% in value of the assets purchased from the profits of the business	$ 58,638.15	
Plaintiff: 17.4% of $58,638.15		$ 10,203.04
Defendant: 82.6% of $58,638.15		48,435.11
		$ 58,638.15

RECAPITULATION

Total estate		$167,509.00
Total estate attributable to money contribution of Mr. Buck	$108,870.85	
Total contribution in effort attributable to Mr. Buck	48,435.11	
Total effort and capital contribution of Mr. Buck		157,305.96
Total estate attributable to money contribution of plaintiff-appellant	0.00	
Total contribution in effort attributable to plaintiff-appellant	10,203.04	
Total effort and capital contribution of plaintiff-appellant		10,203.04
		$167,509.00

A salient fact to be considered in relation to the acquisition of the property here in question is that of Mr. Buck's wise financial management (Tr. 301, 302, 363).

CONCLUSION

Toward the acquisition of the property, plaintiff-appellant contributed no funds, and she contributed relatively little effort. There were no children, and she kept house for herself and Mr. Buck. She was well-maintained and liberally supplied with money and entertainment. She supplied no separate funds and did not work at any outside employment.

Toward the acquisition of the property, Mr. Buck contributed funds amounting to $70,386.01, and he contributed relatively large effort. There were no children. He managed the business and the investments and took care of the yard and house at the residence. He was well-maintained and liberally supplied with money and entertainment through his own efforts and capital. He supplied separate funds and was the manager and chief worker in the business and the sole manager of the investments.

Therefore, in view of the well-settled law in all jurisdictions where the common law is the rule for decision, where the courts uniformly hold that an equitable division of the property acquired during a void marriage shall be made upon a determination of the proportionate contributions of the parties thereto, and

that contributions are defined in terms of money and acquisitive effort; it is submitted that the award to plaintiff-appellant is an abuse of discretion, and exceeds by more than $20,000 the amount to which she is equitably entitled.

Defendant-Respondent and Cross-Appellant respectfully submits that this Honorable Court award to Plaintiff-Appellant not more than the total sum of $10,203.04, without interest, and that it quiet title to the remaining property in him.

Respectfully submitted,

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and Cross-Appellant